**THE HON'BLE MR JUSTICE C.Y.SOMAYAJULU**

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**WRIT PETITION NO : 11221 of 1997**

**Dated: 05-10-2005**

Between:

K. Siva Reddy.

..Petitioner.

And

The Government of Andhra Pradesh, Irrigation Department, rep. by its Secretary, Secretariat,Hyderabad and others..

..Respondents.

**THE HON'BLE MR JUSTICE C.Y.SOMAYAJULU**

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**WRIT PETITION NO : 11221 of 1997**

**ORDER:**

The case of the petitioner is that he, in pursuance of the notification No.41/S.E/96-97 dated 26-2-1997 calling tenders for various works, submitted his tenders for the works at S.Nos. 2 and 3, after depositing two demand drafts of Rs.45,000/- for each of those works for obtaining the tender schedules, but could not reach the office of the third respondent at the time of opening of the tenders, but after reaching the office, he, after coming to know about his tender in respect of item No.2 not being found in the tender box, made a representation to the third respondent about the missing of his tender, but since third respondent, inspite of his written representation dated 17-4-1997, had without even conducting any enquiry and without affording an opportunity of being heard to him, came to a conclusion that he did not submit his tender for item No.2 and recommended to the second respondent to black list him, by forfeiting the earnest money deposit of Rs.45,000/- as per clause 2.1.4 of the terms and conditions, which is wholly arbitrary and violative of Article 14 of the Constitution, respondents may be directed not to black list him and may be directed to refund Rs.45,000/- deposited by him as earnest money for item No.2.

(2) Third respondent filed his counter-affidavit on behalf of respondents alleging that the petitioner who purchased tender schedules for items 2 and 3 by paying Rs.45,000/- for each tender schedule as earnest money deposit on 25-3-1997, did not submit his tender for item No.2, and that those tenders which were to be opened on 4-4-1997 were opened on 7-4-1997 in the presence of all the tenderers at 11-00 A.M. vide notification No.283 M dated 1-4-1997 due to a bundh call given by the political parties on 2-4-1997 and since the petitioner did not return the tender schedule for item No.2 purchased by him to the department within seven days from the date of purchase of the tender, as per the tender conditions. E.M.D. deposited by him therefor is liable to be forfeited and he also is liable to be black listed.

(3) On my direction, the learned Assistant Government Pleader produced the relevant file.

(4) The main contention of the learned counsel for the petitioner is that the petitioner had in fact dropped the tenders for both the works in the tender box,

but was unable to be present at the time of opening of the box due to reasons beyond his control, and after coming to know that his tender for item No.2 was not found in the tender box, he made oral representation to the third respondent about his missing tender for item No.2 but as third respondent did not take any action, he sent a written representation on 17-4-1997 to the third respondent, who without conducting any enquiry, sent a reply that inasmuch as tender in respect of item No.2 was not submitted the earnest money deposit would be forfeited and that he would be black listed, and contended that inasmuch as third respondent did not afford an opportunity of being heard to the petitioner and since petitioner is being penalized for no fault of his and since the action of the respondents in black listing and forfeiting the earnest money deposit of petitioner is violative of Article 14 and 19(1)(g) of the Constitution the action of the respondents against the petitioner is liable to be quashed.

(5) The contention of the learned Assistant Government Pleader is that inasmuch as petitioner failed to submit the tender in respect of item No.2 and since condition No.2.1.4 empowers blacklisting and forfeiture of the earnest money deposit in case where of the purchaser of the tender not either submitting or returning the tender within seven days of its purchase, petitioner is not entitled to any relief.

(6) The register available in the file produced by the learned Assistant Government Pleader shows in respect of Tender No. No.41/SE/96-97 (item No.2, out of item Nos. 1 to 3 thereof, is the subject matter of dispute in this case) for item No.1 relating to lining of the Cheyyeru project main canal from 6500 mts to 8100 mts, six tenders were received, in respect of item No.2 i.e., for lining the canal from 8100 to 10,000 mts, eight tenders were received and in respect of item No.3 i.e., lining of the canal from 100000 to 12000 mts, ten tenders were received. The names of the persons who submitted tenders for item No.2, as per the register, are G. Surendranatha Reddy, V. Viswanatha Reddy, D. Jagan Mohan, K. Rama Subba Reddy, G. Narayana Raju, V. Jayarami Reddy, M/s. I.V.Ramana Reddy and P.C.Venkata Subba Reddy. In respect of item No.3, names of ten persons from whom tenders for that item were received are noted, but only eight persons signed the register. The name of the petitioner is found in Sl.No.5 of item No.3, but his signature is not found against his name.

(7) In his representation dated 17-4-1997, addressed to the third respondent found in the file, petitioner raised six objections. Those objections and my findings thereon are as under:

(i) Tender schedules were issued to all without obtaining declaration from them. This point has no relevance for deciding this petition, more so because such condition in the tender notification is not brought to my notice.

(ii) No register was kept in the office to enable the contractors signing the same in token of their dropping the tender schedules into the tender box. Mere fact that no such register is kept is of no consequence as that procedure is also not fool proof, because tenders can be dropped into the sealed tender box even without signing and even signing the register that person may not drop the tender schedule into the box. That apart since the petitioner did not raise this point in this petition it has no relevance for deciding this petition.

(iii) Police security on the date of opening of tender schedule i.e., on 3-4-1997 should have been arranged. This point also has no relevance for deciding this petition more so because tenders were opened on 7-4-1997, but not on 4-4-1997, the date initially fixed for opening of the tender schedules. Mentioning the date of opening of tender as 3-4-1997 only shows that petitioner is not aware of the date of opening of tenders.

(iv) The tender box was not kept in the police station but was kept in the office of the Superintendent Engineer. Question whether the tender box was kept in the police station or in the office of the Superintendent Engineer is a question of fact, which, when disputed cannot be decided in a writ petition. Petitioner also did not state in his affidavit as to how he came to know that the tender box was kept in the office of the Superintendent Engineer but was not kept in the police station. So, when there is no assertion by the petitioner in his affidavit that he made enquiries and came to know that the tender box was in the office of the third respondent, it cannot be said that the tender box was kept in the office of the Superintendent Engineer, but not in the police station.

(v) The tender rates were cut and are rewritten. This point even if true has no relevance for deciding this writ petition, more so because it is not so alleged in the affidavit of the petitioner.

(vi) After coming to know that his tender for item No.2 was not found in the tender box, he approached the Superintendent Engineer (third respondent) and that he was assured that an enquiry would be made, but without doing so the Superintendent Engineer is dragging on the matter and is withholding information regarding his missing tender schedule. In respect of this plea the relevant portion in para 3 of the affidavit of the petitioner, filed in support of this petition, reads:

> "Immediately I made a representation to the third respondent about the missing of my tender and requested him to enquire into the matter. As there was no response, I made a written representation on 17-4-1997 stating that I have submitted tender schedules for the both the items of work ....."

In reply, the relevant portion in para 6 of the counter-affidavit of the third respondent, reads:

> "In the department the misplacement of tenders will be a serious issue. The opening of tenders is open but not secret. The tenders will be opened in the presence of contractors and departmental officials. Hence, the question of misplacement of tender does not arise. If the tenderer will not put in the tender box the question of finding the same in the tender box does not arise. The tender box will be sealed and kept in safe custody. In this case the tender box was sealed and kept in police station under safe custody of police department and brought the same on 7-4-1997 before opening time and opened in front of six tenderers or their authorized persons and department officials. Hence, missing of the petitioner's tender does not arise....."

Since the averment in para 3 of the affidavit of the petitioner, extracted above, does not support this point No. (VI) raised by the petitioner in his representation, the same need not be taken into consideration.

(8) Since third respondent, in his counter-affidavit, clearly alleged that on the date of opening of the tenders he informed the petitioner, who met him with a request to refund the amount, that as per the tender conditions 2.1.4 and 2.1.5 earnest money deposit cannot be refunded to him, and since petitioner did not file a reply affidavit denying the said fact, it has to be taken that petitioner was so informed. This apart respondents not returning the earnest money deposit to the petitioner does in any way violative of the Articles 14 & 19(1)(g) of the

Constitution, because, petitioner even when he was purchasing the tender schedules, was fully aware of the fact that in case he does not either submit the tender or return the tender within seven days of purchase, he would have to face his consequence mentioned in clause 2.1.4 and 2.1.5. If the petitioner felt that forfeiture of his earnest money deposit as per the tender notification is a penalty, his remedy is elsewhere, but not by way of a writ. So he cannot be granted any relief in this petition.

(9) If petitioner had really submitted his tender in respect of item No.2, when according to him, he attended the office of the third respondent on 7-4-1997 itself, after opening of the tender schedules, he would have raised a hue and cry about his missing tender, and would have given a written representation to the third respondent even on 7-4-1997 itself, as an experienced contractor, and would not have been satisfied by merely giving an oral representation. His submitting a written representation ten days subsequent to the opening of the tender schedules is but an after-thought, probably with a view to serve as a defence in future.

(10) For all the above reasons and since the contention of the petitioner that he submitted his tender in respect of item No. 2 is being disputed by the respondents, question whether petitioner submitted his tender or not cannot be decided in this petition and till he establishes that he submitted the tender for item No.2 also, petitioner cannot be granted any of the reliefs sought in this petition, when the action of the respondents is in accordance with the terms and conditions of the tender notification.

(11) Hence, the writ petition is dismissed with costs.

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5-10-2005

sj